No. 4062

United States

Circuit Court of Appeals

For the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation, Now Known as ALLEN MURPHY COMPANY, a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the District of Oregon.

PLATT & PLATT, MONTGOMERY & FALES,
Attorneys for Plaintiff in Error.
NASH, GRAHAM & MARSCH,
Attorneys for Defendant in Error.

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O. R. MENEFEE LUMBER COMPANY, a Corporation, now known as the ALLEN MURPHY COMPANY, a Corporation,
Defendant in Error.

Brief of Plaintiff in Error.

Upon Writ of Error to the United States District Court of the District of Oregon.

PLATT & PLATT, MONTGOMERY & FALES,
Attorneys for Plaintiff in Error.

NASH, GRAHAM & MARSCH,
Attorneys for Defendant in Error.

Statement.

Plaintiff in error—(plaintiff below, called plaintiff herein) sued defendant in error—(defendant below, called defendant herein) upon an alleged

contract for the sale of twenty-five carloads of Douglas fir lumber, at stipulated prices within New York territory, and different prices within Philadelphia territory.

The complaint alleged:

1. The incorporation of the plaintiff under the laws of New Jersey.

2. The incorporation of the defendant under the laws of Oregon.

3. Diversity of citizenship, and "the amount involved in this cause being above the sum of $3,000.-00."

4. The making of the contract, and the giving of an order based thereon.

5. Plaintiff's reliance upon said agreement, and incurring great expense and costs in advertising the stock of lumber for sale to its clients.

6. On December 13th and 29th, 1919, plaintiff gave shipping instructions to defendant for delivery of two carloads of lumber, approximating twenty-eight thousand feet each, under the contract.

7. On December 19, 1919, defendant advised plaintiff that it had canceled the order for twenty-five cars of lumber, that it would not ship the car asked for under plaintiff's order of December 13th, 1919.

8. Thereafter, plaintiff made numerous demands of defendant for shipment of lumber under its agreements, which defendant refused.

9. The average car of Douglas fir lumber consists of twenty-five thousand feet.

10. When defendant refused to fulfil its contract with plaintiff, the lumber described in the complaint, with New York freight rates, advanced to $16.35 per thousand more than the sale price.

11. Plaintiff prays judgment for $10,218.75.

The Answer.

Defendant answered, admitting Paragraphs 1 and 2 of the complaint; denying Paragraphs 3, 4, 5, 6, and 8, 9, 10 and 11 thereof.

Answering Paragraph 7 of the complaint (which alleged the refusal of defendant to fill plaintiff's orders), defendant denied said paragraph, and stated that on December 2, 1919, immediately upon the receipt by it of the alleged order, *it notified one W. C. Ashenfelter that said alleged order could not and would not be accepted as given,* and that the only way it could handle said order was as an order for random widths and lengths; that in answer to said letter of December 2d, Ashenfelter advised defendant that plaintiff could not place said order for random widths and lengths; that thereupon, and under date of December 18th, 1919, defendant wired Ashenfelter refusing said order, and in the same mail returned said order — "and as this defendant is informed and believes, and therefore says, said Ashenfelter communicated all of said letters and wires to this plaintiff."

Defendant alleged, as a

First Separate Answer and Defense.

1. Plaintiff's incorporation.

2. Defendant's incorporation.

3. That Ashenfelter was its resident lumber broker at Philadelphia;

On November 14, 1919, defendant received an inquiry from Ashenfelter for prices on cars No. 1 common Douglas fir rough (specifying sizes), to be shipped to the order of the plaintiff herein;

The said inquiry was for prices upon lumber to be shipped in any of the sizes or lengths therein specified at the option of the defendant;

Thereupon, defendant wired prices as requested;

On December 2, 1919, defendant received from plaintiff a writing, which purported to be an order for twenty-five cars (specifying sizes of lumber), at the prices defendant had quoted to Ashenfelter;

"That said purported order provided that said material should be shipped in sizes and lengths as wanted by the plaintiff, and should be shipped when wanted by this plaintiff";

Upon receipt of said purported order, defendant immediately notified Ashenfelter that such order was not in accordance with the inquiry nor the notation made by defendant to Ashenfelter, but, contrary to said inquiry and quotation, the said order provided for shipments—buyer's option instead of seller's option;

The defendant notified Ashenfelter that defendant could not accept said order as received by defendant from plaintiff, but could only handle the same in random widths and lengths as per inquiry and quotation;

About December 18, 1919, defendant received from plaintiff instructions to ship approximately twenty-eight thousand feet No. 1 common Douglas fir rough, to be applied on said alleged order;

"That said order specified the number of pieces of each size to be shipped, and likewise specified the lengths thereof";

None of the material so requested to be shipped was less than twenty feet in length, nor more than thirty-six feet in length;

Said request to ship was not in accordance with the inquiry and quotation above-mentioned;

On December 18, 1919, defendant notified Ashenfelter that said order would not be accepted, and returned it to Ashenfelter "for the reasons above set forth."

4. Defendant is informed and believes, and says that Ashenfelter communicated such correspondence to plaintiff, who had full notice and knowledge thereof—"and this defendant further says on information and belief that said Ashenfelter in said transaction, without the knowledge, consent or acquiescence of this defendant, was the agent of and represented said plaintiff."

Second Affirmative Defense.

This defense sets forth a counterclaim for $551.32, which plaintiff owes defendant.

This counterclaim is admitted.

The Reply.

The reply placed in issue the controverted facts of the first defense.

By stipulation in writing the parties waived a jury, and agreed to try the case before the Court (Transcript, pages 23, 24).

Thereafter, by stipulation all the pleadings were amended to properly describe the corporation defendant (Transcript, page 25).

Findings of Fact and Conclusions of Law.

The cause was tried to the Court, without a jury, the Court rendering Findings of Fact, as follows: (Transcript, pages 26, 27):

I. That the parties hereto are corporations.

II. That the plaintiff has failed to sustain the averments of its complaint, and in particular has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in plaintiff's complaint.

III. That the alleged order is unilateral and wanting in mutuality.

IV. The parties stipulated the correctness of the counterclaim, etc.

Conclusions of Law.

The Court concluded (Transcript, page 27):

"That the defendant is entitled to a judgment dismissing plaintiff's complaint with costs, and for a judgment against the plaintiff on defendant's counterclaim, in the admitted sum of $551.32, with interest thereon at six per cent per annum from January 31, 1921, until paid."

Judgment.

The judgment was entered accordingly, dismissing plaintiff's complaint, with prejudice, and awarding defendant an affirmative judgment on its counterclaim, and for costs. (Transcript, pages 28, 29.)

The judgment was entered December 4th, 1922, and the writ of error was not sued out until June 2d, 1923.

Assignment of Errors.

Plaintiff relies upon the following assignments of errors for reversal: The Court erred,

I.

In finding "That the plaintiff has failed to sustain the averments of its complaint," and in thereafter retaining jurisdiction of the case and deciding said case upon its merits.

II.

In its special finding of fact that the plaintiff has failed to sustain the averments of its complaint, and in particular has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in plaintiff's complaint.

III.

In its finding of fact number III, to wit:

> "That the alleged order is unilateral and wanting in mutuality."

IV.

The Court erred in rendering the judgment against this plaintiff and considering the case on its merits after this finding, to wit:

> "That plaintiff has failed to sustain the averments of its complaint."

Upon this pleading the plaintiff relies upon the following points and authorities:

Point I.

The Court found against the plaintiff's allegations

of jurisdictional amount in controversy and thereby divested itself of power to decide the merits of the case.

Judicial Code, Sec. 37.

Gilbert vs. David, 235 U. S. 561.

Oregon has changed her former practice and now requires "all defenses"—including pleas in abatement in actions at law to be joined in one answer:

Or. Laws 1920, Sec. 74.

and the issue of the amount in controversy is tendered by denial.

Gilbert vs. David, 235 U. S. 561.

Cent. Grain & Stock Ex. vs. Board of Trade (7th C. C. A.), 125 Fed. 466.

Point II.

The sufficiency of the pleadings is properly raised for the first time in the appellate court.

Ky. Life Ins. Co. vs. Hamilton.
63 Fed. 99 (6th C. C. A.).

Pontiac vs. Talbot Paving Co.
94 Fed. 67.

Mound Coal Co. vs. Jeffy Mfg. Co.
233 Fed. 916.

Bausman vs. Blunt, 147 U. S. 652.
(Local law decisive), 37 Law Ed. 318.

3 C. J. 878—Sec. 776.

Or. Laws, Sec. 72.

Stanchfield Co. vs. Cent. Ry. of Oregon,
67 Or. 396.

Point III.

The question whether special findings conform to the pleadings is always in the record and arises without a bill of exceptions.

3 C. J., p. 878, Sec. 776.
Booth vs. F. & T. N. Bank,
47 Or. 299.
Maule vs. Schaut,
41 Or. 425.
Retzer vs. Wood,
109 U. S. 185; 27 L. 900.
Shore vs. U. S. 282 F. 857–859 (Points 3 and 4).
Juanto vs. Wright (Or.), 187 P. 1036.

Point IV.

Special findings are self-excepting and may be reviewed without a bill of exceptions.

St. Joseph Stockyards vs. U. S.,
187 Fed. 104 (105).
St. Louis vs. Wiggin,
11 Wall. 428; 20 L. 192.
Webb vs. National Bank,
146 Fed. 719.
Norris vs. Jackson, 9 Wall. 125, 76 U. S. 125;
19 L. Ed 608.
Metcalf vs. Waterton, 68 Fed. 859 at 864.
Sec. 700 R. S. U. S. C. R. & I. P. vs. Barnett,
169 Fed. 241.

Point V.

Defendant cannot prove a defense different from that alleged or from his admissions in the answer.

Holland vs. Rhodes, 56 Or. 206.
Knahtla vs. O. S. L., 21 Or. 136.

Point VI.

Secret or private instructions to an agent, however binding they may be as between principal and agent, can have no effect on a third person who

deals with the agent in ignorance of the instructions and a reliance on the apparent authority with which the principal has clothed him.

31 Cyc. 1327.

As to third persons such secret instructions are no restriction upon the apparent authority of a general agent for persons dealing with an agent are, in the absence of special proof to the contrary, presumed to know only of his general authority.

31 Cyc. 1328.

And a special agent who acts within his apparent power, will bind his principal, although he has received private instructions which limit his special authority.

31 Cyc. 1329.

31 Cyc. 1331 to 1335.

And if the principal has clothed an agent with *apparent* power to sell personal property, or has held out the agent publicly as having such power of sale, the principal will be bound.

31 Cyc. 1349.

(a) Corporations are bound by acts of their agents within the scope or apparent scope of the agent's authority.

Sherman, Clay & Co. vs. Buffum & Pendleton, 91 Or. 352.

Neppach vs. Ore. & C. R. R. Co. 46 Or. 391.

West vs. Washington Ry. Co., 49 Or. 436.

Dillard vs. Olalla Mining Co., 52 Or. 132.

(b) Acts of an agent though not communicated to his principal, are binding upon the principal if

within the scope or apparent scope of the agent's authority.

Dillard vs. Olalla Mining Co., 52 Or. 126 (132).
Saratoga Inv. Co. vs. Kern, 76 Ore. 243 (253).
(Cases collated.)
Wood vs. Rayburn, 18 Ore. 1.

(c) One dealing with an agent may, lacking contrary knowledge assume that the agent is a general agent of his principal.

Hillyard vs. Hewitt, 61 Or. 58.
Rae vs. Heilig Theater, 94 Or. 408.
Aerne vs. Gostlow, 60 Or. 113.

Point VII.

The order involved (transcript pages 8 and 9) was signed,

"OWEN M. BRUNER COMPANY,
W. C. Ashenfelter,
Agt. for O. R. Menefee Co."

These signatures show a bilateral, mutual contract sufficient to bind the parties.

Hensen vs. Boyd, 161 U. S. 397; Bk. 40 L. 746.
Bibb vs. Allen, 37 L. 824 (825).
Clews & Jamieson, 182 U. S. 491, 45 L. 1183.
White vs. Houston, 200 Fed. 390 (8 C. C. A.).
Thorne vs. Brown, 257 Fed. 519–525.
(Construes U. S. Statute on Cotton Futures);
(Certiorari denied by U. S. Supreme Court, in effect, an affirmance.)

Argument.

The Court will observe that no bill of exceptions appears in the record. The plaintiff in error is

therefore limited to such defects, if any, as appear upon the face of the judgment-roll consisting of its various papers, to wit, the pleadings, the findings and conclusions, and the judgment.

Predicated upon this record, thereore, the plaintiff argues:

Point I of Argument.

The Court found against the allegations in the complaint stating the amount in controversy, but, nevertheless, retained jurisdiction to determine the cause on its merits.

The pleadings admit the diverse citizenship of the corporations plaintiff and defendant.

Paragraph III of the complaint says (Transcript, page 7):

"III.

"That the grounds upon which the Court's jurisdiction depends in this case are the diversity of citizenship existing between plaintiff and defendant herein, and the amount involved in this case being above the sum of $3,000.00."

The answer (Transcript, page 14) denies Paragraph III and other paragraphs of the complaint.

The question of jurisdictional amount in controversy was therefore made an issue.

The Court finds (Transcript, page 26):

"I.

"That the parties hereto are corporations.

"II.

"That the plaintiff has failed to sustain the averments of its complaint, and in particular

has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in the complaint."

The finding by the Court—"That the plaintiff has failed to sustain the averments of its complaint"—is a direct finding, either general or special, against the allegation of jurisdictional amount in controversy.

When the Court found this fact, he should have dismissed the case, without deciding it upon its merits.

Judicial Code, Section 37, says:

> "If in any suit commenced in the District Court, or removed from a state court to a District Court of the United States, it shall appear to the satisfaction of said District Court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court * * * the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require and shall make such order as to costs as shall be just."

Like provision existed in the Act of March 3d, 1875.

Central Grain & Stock Exchange vs. Board of Trade (7th C. C. A.), 125 Fed. 466, says:

"In every case the question with which a federal court is first confronted is that of its jurisdiction, both over the subject matter and of the party; and this jurisdiction must affirmatively appear upon the record. So far has this doctrine been carried that judgments have been frequently reversed upon appeal because the records did not disclose the essential jurisdictional facts. Railway Company vs. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; Hancock vs. Holbrook, 112, U. S. 229, 5 Sup. Ct. 115, 28 L. ed. 714; Ayers vs. Watson, 113 U. S. 594, 598, 5 Sup. Ct. 641, 28 L. ed. 1093; Insurance Company vs. Rhoades, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380; Metcalf vs. Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. ed. 543; Railroad Company vs. Davidson, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. ed. 672. These cases are to the effect that it is absolutely essential that the jurisdictional facts appear by the record; that it is error to proceed unless the jurisdiction of the court be so shown; that the absence of jurisdictional facts cannot be waived; that the failure of the record to disclose such facts should be noticed by the court *sua sponte,* and may be assigned for error by the party at whose instance the error was committed."

See also Gilbert vs. David, 235 U. S. 561, 35 Sup. Ct. Rep. 165.

We respectfully urge, therefore, that the judgment-roll itself shows want of jurisdiction to de-

termine the merits of the cause other than sufficient inquiry by the lower court upon which it based its finding quoted above.

Point II of Argument.

Though no bill of exceptions is found in the record, yet the findings of the Court are special, and as such are self-excepting.

Where the findings of the Court are special, their sufficiency for any matters appearing on the record is one of law for the Court, and no exception need be taken or preserved in a bill to challenge either the sufficiency of the evidence to support the special findings, or that the special findings are at variance with the pleadings, or that they do not support the judgment.

(a) The question whether the special findings conform to the pleadings is always in the record, and arises without a bill of exceptions.

Norris vs. Jackson, 9 Wall. 125, 76 U. S. 125, 19 L. 608, says:

> "In the case of a special verdict, the question is presented as it would be if tried by the jury, whether the facts thus found require a judgment for plaintiff or defendant; *and this being a matter of law, the ruling of the Court on it can be reviewed in this Court on that record.*"

St. Joseph Stockyards Company vs. U. S. (8th C. C. A.), 187 Fed. 104, says:

> "Counsel for the United States contends that the question whether or not the special findings sustain the judgments cannot be considered

in this court, under Rogers vs. United States, 141 U. S. 548, 12 Sup. Ct. 91, 35 L. ed. 853, and United States vs. Cleage, 88 C. C. A. 249, 161 Fed. 85, because these cases were tried in the District Court. But he is mistaken. They were commenced, were tried, and the judgments were rendered in the Circuit Court, and in such a case the special finding, like a special verdict, becomes a part of the record, and the question of its sufficiency to sustain the judgment arises, without contemporaneous objection or exception, in the absence of a bill of exceptions to present them. St. Louis vs. Ferry Company, 78 U. S. 423, 428, 20 L. ed. 192; Norris vs. Jackson, 76 U. S. 125, 128, 19 L. ed. 608."

Webb vs. National Bank (8th C. C. A.), 146 Fed. 717, at page 719, says:

"No objection or exception is required, however, to present to an appellate court the question whether or not the facts found sustain the judgment, because like the question whether or not a verdict sustains the judgment upon it, this is an issue of law which arises upon the face of the record. St. Louis vs. The Ferry Company, 78 U. S. 423, 428, 20 L. Ed. 192; Tyng vs. Grinnell, 92 U. S. 467, 469, 23 L. Ed. 733; Aetna Ins. Co. vs. Boon, 95 U. S. 117, 125, 24 L. Ed. 395; Allen vs. St. Louis National Bank, 120 U. S. 20, 30, 7 Sup. Ct. 460, 30 L. Ed. 573; Seeberger vs. Schlesinger, 152 U. S. 581, 586, 14 Sup. Ct. 729, 38 L. Ed. 560; Hooven,

> Owens & Rentschler Co. vs. John Featherstone's Sons, 49 C. C. A. 229, 234, 111 Fed. 81, 86."

See additional authorities, Points III and IV this brief.

In addition, it is too well settled to need argument that the sufficiency of the pleadings is properly presentable for the first time in the appellate court. This is a point of practice which is governed by local laws.

See Bausman vs. Blunt, 147 U. S. 652, 37 L. Ed. 318.

Stanchfield Company vs. Central Railway of Oregon, 67 Or. 396, says:

> "Plaintiff by pleading over after a demurrer to the answer was overruled, did not waive the objection that the answer did not state facts sufficient to constitute a defense, and such objection could be raised at any time during the trial or on appeal."

Mound Coal Company vs. Jeffrey Mfg. Company (4th C. C. A.), 233 Fed. 913, says:

> "Though defendant pleaded over after the overruling of its demurrer to the declaration, went to trial, and failed to renew the demurrer, and asked for verdict under all the evidence at the close of the case, the sufficiency of the declaration to state a cause of action may be reviewed as an unassigned error appearing on the record."

See additional authorities under Point II this brief.

Plaintiff therefore urges that the special findings made by the Court are not in conformity with, but vary from the allegations of the pleadings.

The special findings of the Court are these: (Transcript, pages 26, 27.)

"II.

"That the plaintiff has failed to sustain the averments of its complaint, and in particular has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in plaintiff's complaint.

"III.

"That the alleged order is unilateral and wanting in mutuality."

ASHENFELTER'S AUTHORITY.

The basis of special finding II rests in the finding by the Court that the plaintiff had not shown Ashenfelter's authority to accept the order set forth in the complaint, appearing at pages 8 and 9 of the transcript.

That order *apparently* is signed as follows:

"OWEN M. BRUNER CO.
W. C. Ashenfelter,
Agt. for O. R. Menefee Co."

The order does not purport to be signed by Ashenfelter as special agent, but by Ashenfelter as agent of the O. R. Menefee Company.

The complaint makes no allegation of Ashenfelter's authority. It is founded upon Ashenfelter's *apparent* authority.

The record shows that the transaction under consideration relates to the sale of *personal property*; that the transaction was closed in Philadelphia, Pennsylvania; that Owen M. Bruner Company is in Philadelphia, Pennsylvania; and that Ashenfelter, agent of O. R. Menefee Company, was at Philadelphia.

So far as the complaint shows, therefore, the transaction was between plaintiff and *an unlimited agent of the defendant acting within the scope of his authority.*

The answer (Transcript, page 14) denies paragraph IV of the complaint, but it makes no specific allegation of new matter on said paragraph.

The answer of denials (Transcript, pages 14, 15) shows that the defendant did not notify Ashenfelter that it could not accept this order until after December 2d, 1919, whereas the order was given November 25th, 1919 (Transcript, page 8).

The affirmative answer (Transcript, pages 15 to 18) alleges at paragraph III (Transcript, pages 16, 17) many details of the transaction, and by compiling the data set forth at paragraph III of the affirmative answer with the data in plaintiff's complaint, the chronology of events involving this case appears thus:

(a) On November 14, 1919, defendant received an inquiry from Ashenfelter for several cars of specified lumber. (Answer, Transcript, page 16.)

(b) Such inquiry was for prices on delivery in quantities at defendant's option. (Answer, Transcript, page 16.)

(c) Thereupon, defendant telegraphed prices on said material as requested. (Answer, Transcript, page 16.)

(d) Thereafter, about December 2d, 1919, the defendant received from plaintiff the order for twenty-five cars, etc. (Answer, Transcript, page 16.)

(e) The said order is set out at length in the complaint. (Complaint, Transcript, pages 8, 9.)

(f) Immediately upon receipt of said purported order, defendant notified Ashenfelter that the order was not in accordance with the inquiry of Ashenfelter, nor with the quotations, but, on the contrary, provided for a transaction at *buyer's* option instead of *seller's* option as to time and quantity of delivery. (Answer, Transcript, pages 16, 17.)

(g) On December 18, 1919, defendant received plaintiff's shipping instructions for twenty-eight thousand feet No. 1 common Douglas fir rough, to be applied upon said alleged order; said order specified the number of pieces, sizes, and lengths, etc. Said request was for shipment at *buyer's* option, not *seller's* option, and violated the quotations which defendant made Ashenfelter. (Answer, Transcript, page 17.)

(h) On December 18, 1919, defendant notified Ashenfelter that the order would not be accepted, and returned said order to Ashenfelter for the above reasons. (Answer, Transcript, page 17.)

The answer at paragraph IV says: (Transcript, page 18.)

"IV.

"That this defendant is informed and believes and therefore says that said Ashenfelter com-

> municated all of said correspondence between him and this defendant with reference to said order to the plaintiff who had full notice and knowledge thereof, and this defendant further says on information and belief that said Ashenfelter in said transaction without the knowledge, consent or acquiescence of this defendant was the agent of and represented said plaintiff."

The answer fails to allege plaintiff's knowledge of Ashenfelter's limitation or secret instructions until after the contract was made.

The admitted facts show that these negotiations began November 14th, 1919 (Answer, Transcript, page 16) and the order, set forth in the complaint, is dated November 25th, 1919.

The attempted cancellation of such order was not until December 18th, 1919. (Answer, Transcript, page 17.)

The order itself (Transcript, pages 8, 9) says:

> "This order covers order given you over 'phone on November 21st, and bears correction as per your letter of the 22d inst."

The pleadings therefore show that negotiations began by communication dated Noember 14th, 1919; they were continued by telegram from defendant to Ashenfelter; and on November 21st, 1919, the plaintiff and Ashenfelter had negotiations which were corrected as per Ashenfelter's letter of November 22d, 1919, and resulted in the order of November 25th, 1919.

The answer does not allege that Ashenfelter was a *limited agent* of the defendant, nor does it allege that the defendant ever notified plaintiff that Ashenfelter's authority was limited, nor did defendant notify the plaintiff, *except through Ashenfelter,* of any claim of variance between the order and the agreement.

No notice to plaintiff of any question concerning the validity of the order was made or raised until December 18th, 1919, — almost one month after the order was given, although the order tells the defendant, through its agent Ashenfelter (Transcript, page 8),

> "We shall immediately begin a campaign for orders, and will send same to you as soon as we book the business."

The plaintiff therefore urges that the answer does not set up the defense of a known want of authority, because it does not show:

(a) That Ashenfelter was an agent with limited authority;

(b) That no notice of the limitation of power was given to plaintiff before the transaction;

(c) That plaintiff received any such notice until a month after the order was given;

(d) That Ashenfelter was not a general agent for the sale of personal property.

On the other hand, the answer alleges:

(a) That Ashenfelter was a resident of Philadelphia, "and represented this defendant as a lumber broker, and not otherwise";

(b) That plaintiff dealt with Ashenfelter as the agent of the defendant;

(c) That no notice of any claim of limitation of Ashenfelter's power was given plaintiff until about December 18th, 1919;

(d) That meanwhile, plaintiff had changed its relations based upon the contract with defendant, as shown in the written notice contained in the order. (Transcript, pages 8, 9.)

Plaintiff asserts, therefore, that the finding of the Court is at variance with the facts shown by the pleadings, because the Court found:

First. (Transcript, pages 26, 27) That plaintiff failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in the plaintiff's complaint; and

Second. (Transcript, page 27) That the order is unilateral and wanting in mutuality.

Plaintiff urges that the answer sets forth only secret, undisclosed and unknown instructions between the principal and his agent; that the whole record shows that plaintiff dealt without knowledge thereof, and purchased personal property without any knowledge of the limitation of the power of the agent with whom he dealt.

It is plaintiff's contention that the court made its findings on a defense not pleaded, and that the special findings vary from the defense as pleaded. This we submit cannot be done.

Holland vs. Rhodes, 56 Or. 206.

Knahtla vs. O. S. L., 21 Or. 136.

Aerne vs. Gostlow, 60 Or. 113 says:—

> The question is not so much what actual authority Krull possessed as what authority he *apparently* possessed; and persons dealing with the corporation were not bound to search its records and ascertain what limitations this placed upon his power to act, if it permitted him to hold himself out as an agent in charge of its bonding business."

And again in 60 Or. at 121, the court says:—

> "Persons dealing with a known agent have a right to assume, in the absence of information to the contrary, that his agency is general."

Metheun Co. vs. Hayes, 33 Me. 169.

Austrian & Co. vs. Springer, 94 Mich. 343 (54 N. W. 50; 34 Am. St. Rep. 350).

See also, 31 Cyc. 1328, 1329, 1331 to 1335.

Corporations are bound by the acts of their agents within the scope or apparent scope of the agent's authority.

Sherman, Clay & Co. vs. Buffum & Pendleton, 91 Or. 352.

Neppach vs. Ore. & C. R. R. Co., 46 Or. 391.

West vs. Wash. Ry Co., 49 Or. 436.

Dillard vs. Olalla Mining Co., 52 Or. 132.

Under these authorities, the instructions from Menefee to Ashenfelter as alleged in the answer are secret instructions, because it is not alleged that they were communicated to plaintiff before the transaction was closed, and because further Ashenfelter apparently had the authority to make the contract set forth in the pleadings.

The answer alleges that the defendant received the order on December 2d, 1919, and immediately notified Ashenfelter, etc. (abstract 16, 17), but it does not say when Ashenfelter notified Bruner, except that at page 18, paragraph 4 it makes an allegation that Ashenfelter communicated the correspondence to the plaintiff, but does not give any date, therefore, it does not charge the plaintiff with dealing with a limited agent, or with knowledge of the instructions which Menefee gave Ashenfelter until, in fact, the transaction was closed.

It is also well settled that the acts of an agent, though not communicated to his principal, are binding upon the principal if within the scope or apparent scope of the agent's authority, and that notice to such agent within the apparent scope of his authority is notice to the principal.

Dillard vs. Olalla Mining Co., 52 Or. 126 at 132.
Saratoga Inv. Co. vs. Kern, 76 Or. 244 (Point 4) and authorities at page 253.

The notice which Bruner gave Ashenfelter in the order set out in the complaint (transcript 8, 9) is this:—

> "We shall immediately begin a campaign for orders, and will send same to you as soon as we book the business.
>
> "This order covers orders given you over phone on November 21st, and bears correction as per your letter of the 22d inst."

This order is the one which defendant admits it received on December 2d. The pleadings, therefore, show negotiations as heretofore set forth, and that on November 21st and 22d dealings were had

between plaintiff and Ashenfelter, as agent for defendant, whereby the agent was notified that plaintiff was changing his relation in incurring new contracts based upon the fulfillment of the order which Ashenfelter, as agent, accepted.

And, the answer contains no allegation that the defendant ever notified plaintiff directly of any claimed limitation of authority of Ashenfelter or of any difference or variance between the order and the contract, therefore, we say that finding of fact number two is contrary to the pleadings, and is a finding upon an issue which is not tendered.

Mutuality of Contract.

The Court found (transcript page 271, III) that the alleged order is unilateral, and wanting in mutuality.

As above pointed out, the order is signed by Owen M. Bruner Company, and is signed by the Menefee Lumber Company, by its agent, whom it asserts in its answer is its resident lumber broker at Philadelphia.

The order is specific as to quantities and qualities of lumber, the price to be paid, and as to freight rates.

The defendant says the agreement was for sale at seller's option, and that the order is at buyer's option, but this does not show that the order was unilateral, nor does it show lack of mutuality, as both parties signed the order.

It does show that Ashenfelter did not take the order as per instructions from his principal.

The question, therefore, reverts to that already discussed, and we submit we have shown that plaintiff was justified in relying upon Ashenfelter's authority or apparent authority, for the reasons heretofore argued.

The order is not assailed because of indefiniteness in its terms, or indefiniteness in the amount or price to be paid, or time of shipment, nor for insufficiency in form or substance.

It is assailed solely upon the ground that Ashenfelter disobeyed the secret instructions of his principal; therefore, we respectfully urge that the lower Court erred in finding that the order lacked mutuality and was unilateral.

The order is signed by the parties who are to be charged thereby, and hence is neither unilateral nor lacking in mutuality on its face.

Hansen vs. Boyd, 161 U. S. 397; Bk. 40 L. 746.
Bibb vs. Allen, 37 L. 824 (825).
Clews & Jamieson, 182 U. S. 491; 45 L. 1183.
White vs. Houston, 200 Fed. 390 (8 C. C. A.).
Thorne vs. Brown, 257 Fed. 519–525 (Construes U. S. Statute on Cotton Futures). (Certiorari denied by U. S. Supreme Court, in effect, in affirmance.)

From the condition of the pleadings, plaintiff respectfully submits that the finding that the alleged order is unilateral and wanting in mutuality, as well as the finding that Ashenfelter's authority is unproven are both on issues not properly presented by the pleadings, and hence the findings are not supported by the allegations of the answer.

We believe that we have shown:—

(1) That the court was without jurisdiction to pass upon the merits of the case after finding against plaintiff on the allegation of the amount in controversy;

(2) That the special findings are self-excepting, and are assailable for variance with the pleadings, and as being upon matters not in issue; and

(3) That the special findings are contrary to the conditions shown by the pleadings because no charge is made in the answer that the plaintiff had any knowledge of any alleged limitation upon Ashenfelter's power, or knew of any secret instructions from Menefee to Ashenfelter until long after the giving of the order set out in the complaint.

For the foregoing reasons, we submit that the judgment on the merits should be reversed, and that if plaintiff is conclusively bound by the finding, to wit: "That plaintiff has failed to sustain the averments of its complaint," then the defendant likewise is conclusively bound by such finding, and the lower court should have dismissed the case upon that finding *sua sponte* without considering the merits of the case.

Very respectfully,

PLATT & PLATT, MONTGOMERY & FALES,

Attorneys for Plaintiff in Error.